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ABSTRACT

Three alternative techniques of impasse resolution available to education management--mediation, fact-finding, and arbitration--are discussed in this paper. The basic goal of mediation, the first technique used to settle disputes in bargaining, is to come to an agreement. While mediation has its limitations, it can result in the resolution of impasses by the mere fostering of communications between the parties. Fact-finding, a less effective technique, can be used either with or without recommendations. Finally, arbitration is used where the interpretation of the terms of an agreement is involved. However, compulsory arbitration is not a viable alternative for impasse resolution in public schools, the paper states. The paper concludes that while forestalling excessive demands by employees, a school board must simultaneously strive for smooth employer-employee relations to ensure high morale and productivity. Thus, alternatives available for impasse resolution must be assessed carefully in order to reach an agreement that can be accepted by all parties. (Author/LD)

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ALTERNATIVE IMPASSE RESOLUTION PROCEDURES
FOR EDUCATION BARGAINING

By: Dan C. McCubbin

(A speech delivered at Clinic D-52 of the National School Boards Association Convention, April 23, 1979).

In order to effectively analyze the alternative techniques of impasse resolution available to education management, it is necessary to recognize and accept the premise that collective bargaining has resulted in a grant of power to teachers and other school employees at the expense of diminishing the authority of school boards and school administrators. The mode of education administration before collective bargaining was one of unilateralism where administrators were granted full authority and responsibility for making all decisions related to delivery of educational services to the local community. This mode of operation abruptly came to a halt with the advent of collective bargaining. When the rhetoric of teacher associations moved from the "professional input" dialogue to the real goal of bilateral decision-making it was inevitable that there would be disputes between Boards and employees over the terms of a contract.

When these disputes arise in the overall scheme of the collective bargaining process school management must clearly perceive its role as one of an advocate for the school community. This role as a gatekeeper to the resources of the school district is made difficult, if not impossible, when teacher and other employee organizations demand "more, more, more," and the Board must hold its ground and insure that the interest of the community at large are not compromised by these insistent demands. While forestalling excessive demands by employees, the Board must simultaneously strive for smooth employer-employee relations in order to insure the highest morale and productivity possible. These two countervailing concepts may at first glance seem irreconcilable, but in actual practice they are not. Seasoned employee representatives know full well that management cannot afford to "give away the shop" and still function effectively.

Adoption of a tough but reasonable bargaining attitude by management can lead to a higher degree of employee morale and productivity based on mutual respect. Before this highly desirable goal can be achieved, however, public officials must establish a strong management team instilled with a proper management bargaining philosophy and a high degree of authority and responsibility for contract negotiations. This team should be well rewarded and never undermined in the eyes of employees. If gearing up for collective bargaining calls for changes in management structures, they must be made in order to insure a cohesive management group which can successfully negotiate and administer labor agreements with employee organizations.

These changes in attitudes, resource allocation, and administrative structures are

absolutely necessary if management in the education sector is to achieve that level of sophistication in labor matters required to maintain a mature employer-employee relations program which will serve the greater public interest.

If the proper management framework has been established for bargaining, the alternatives available for impasse resolution have been considered and assessed based upon the unique circumstances surrounding the current status of the total bargaining relationship between the Board, its employees and the community. In the first instance, there is an obligation to avoid the danger of creating such a proliferation of procedural devices to deal with impasse that bargaining will break down or never really develop. Therefore, each impasse procedure available should be evaluated as to effectiveness by using the standard of ultimate usefulness in achieving an agreement that can be accepted by all parties. Even in states where procedures for impasse are mandated by legislative action, the parties must make all ultimate decisions to agree or not to agree.

Impasse procedures for use, almost exclusively, in the public sector have developed because of the unique differences in public sector collective bargaining from those in the private sector. Public sector bargaining is much more limited in scope. Where public employees have been granted the right to bargain, the pre-existing vast network of laws dealing with compensation, fringe benefits and personnel policies have not often been repealed or amended to permit or encourage bargaining. In fact, most legislation provides that such bargaining is to be within statutory limitations. Other differences include the massive proliferation of rules and regulations and the authority of bargainers.

Of course, the most significant difference between private and public sector bargaining is that strikes in the private sector are ordinarily legal, whereas strikes in the public sector are almost universally illegal. Now from a practical viewpoint, we all know, just because strikes are against the law has not deterred public employees and especially teachers from the frequent use of this technique to achieve impasse resolution. And when viewed from a pragmatic point of view these strikes have served to jolt the public and many school boards from their lethargy into a realistic understanding of the power dynamics of public employee unions. If this lesson has not been learned by now, it does not make much practical difference whether strikes are illegal or legal; they will continue to occur anyway. Therein is the challenge to Boards and administrators to develop adequate alternatives to the strike as a weapon available to public sector unions for impasse resolution. Debate about strike legality or illegality overlooks the pressing need to develop workable "peaceful" impasse procedures.

At this point in time, the state of the art in reference to alternative impasse resolution procedures, includes the techniques of mediation, fact-finding, and arbitration. In addition to these usual procedures, there has developed spin-offs or mixes that involve such procedures as med-arb and final offer arbitration. All of these procedures require the involvement of a third-party neutral. All are usually utilized in a sequence of ascending order with mediation being the first technique used and arbitration being the last, if it is used at all.

The value of mediation for resolution of disputes and impasse situations has long been recognized by practitioners in both the private and public sectors. Since collective bargaining is basically a process of communication and compromise, the involvement

of a qualified and experienced mediator at the proper time in crisis bargaining can serve to defuse a potentially explosive environment. Usually this atmosphere involves not only the parties bargaining terms but in the case of school boards the students, parents and community, as unwilling captives of the process.

It is not possible to describe a lock-step process when one discusses mediation procedure. This process is highly individualized and varies from person to person and from case to case. However, all mediators have certain basic procedural, communications and persuasive functions. It must also be understood by the parties that the inclusion of a mediator does not change the basic two-party negotiation process. This new element of a third-party neutral has been inserted to assist, not supplant, the parties in the process. It is absolutely imperative that the parties and especially management keep uppermost in mind that the basic goal of a mediator is to get an agreement. The mediator is not concerned with the later difficulties that may be involved in the administration of that agreement experienced by either party. In mediation, it is a fundamental concept that each party must accept the responsibility for the final agreement and cannot shift responsibility if problems develop after agreement.

Within the above framework let me now turn to a few of the practical considerations faced by Boards concerning the use of mediation as an impasse resolution technique.

The first consideration is whether to use mediation in a specific impasse situation? By the very nature of mediation there is no one clear or consistent answer to the whether-to-mediate question. While no precise formula is possible the basic go or no go decision must include such factors as the mediation services available, the status of negotiation in terms of issue difference and the attitudes of the parties in terms of the potential success of the process.

Another consideration closely related to the "whether" is the appropriate time or the "when" question. This consideration usually allows for three points of entrance for a mediator in the negotiation process. The mediator is requested to enter immediately or asked to prepare to enter at a specific point or the mediator may be requested to hold an open schedule as much as possible and wait for further notice as to the best possible entrance time. Most persons involved would answer the question of "when" by involving the mediator in negotiation when it becomes reasonably clear that negotiations are "in trouble" or soon will be.

The major consideration for practitioners is how to use a mediator to the maximum benefit for the achievement of a reasonable contract that can be administered during its existence. Since mediation is not a precise science and is in fact an art, the variables as to use are so many that it would be an exercise in futility to attempt to describe either typical or model mediator behavior with respect to sequence, timing, or use and non-use of the various functions theoretically available. Aside from the usual functions of meeting with both parties in joint session and separate meetings with the parties combined with homework on the issues in dispute, an individual mediator may use any number of methods based upon a depth of experience in the practice of the art. Any sequence used by the mediator should be aimed at meeting the basic conceptual notion that assistance by the mediator should be proffered only in those areas in which it is needed, and then only to the extent necessary to promote progress by the parties themselves. Some functions used by mediators to achieve the above goal include identifying priorities, deflating extreme and unreasonable positions, offering creative suggestions on specific issues, assessing costs of a work stoppage against values of remaining issues and possibly recommending a "package" settlement.

Another consideration to be given in preparing for mediation is the issue of who will mediate and if there will be simultaneous participation by two or more mediators. Mediation is not a profession and no course of study can prepare one for the role, therefore it is necessary to select mediators who through the wars of experience have demonstrated that they can be impartial and effective in similar situations. An inexperienced mediator can fuel the fires of dispute to such an extent that a serious two-way dispute becomes an explosive three-way dispute.

While the process of mediation has built-in limitations, the results indicate that mediation has worked as an aid to the resolution of collective bargaining impasses even with its built-in limitations. This usefulness of mediation has resulted in resolution of impasses by the mere fostering of communication between the parties which opens the way to eventual compromise and settlement.

If the problem in bargaining cannot be settled by the mediation process the next procedure to be used in impasse resolution is fact-finding. The words fact-finding conjure up notions of preciseness, of objectivity, of virtue. It even has a Godlike quality. Who can disagree with facts? The rather obvious implication of fact-finding is that some third-party neutral who does not know the facts of a impasse may enter the process and establish facts whose proclamation will somehow assist in settlement. The fact-finding process may involve two distinct variations: fact-finding without recommendations and fact-finding with recommendations.

Fact-finding without recommendations is based upon the premise that facts alone will help settle a dispute. If negotiations on an issue have become stalemated, a fact-finder will explore and evaluate the areas of factual difference. In the absence of

authority to make specific recommendations for settlement, that is all he can do.

When considered in light of the true atmosphere surrounding an impasse, this technique holds a low degree of success in resolution of impasse.

The more attractive procedure or variation is fact-finding with recommendations. This procedure goes beyond the mere exercise of finding facts to the judgment assessments of one in possession of a basis in fact to recommend a possible roadmap from the despair of dispute to the success of settlement. This procedure must be implemented with the practical goal of acceptance of recommendation by both parties or at least an emphasis on the need for acceptance. After all the basic reason for utilization of the process is the desire to bring about a settlement.

The fact-finding process should be structured in a semi-judicial framework similar to that of arbitration. Hearings are formal and each side presents its case to the fact-finder, through evidence and testimony. If the parties have not prepared or fail to grasp the true significance of preparation the advantage of this procedure can be lost. After the formal presentation of positions on issues the fact-finder issues a written report of facts and value judgments in the form of recommendations. The bottom success-fail line comes when the parties accept or reject the recommendations.

At the point of final recommendations this procedure can become a combination of mediation and fact-finding because an experienced fact-finder can easily slip into the role of mediator and use the recommendations to mediate an acceptable settlement or resolution of the impasse.

Another added weapon given to the fact-finder in many procedures is the authority to make the fact-finding report public. This technique has been very useful in many

teacher-school board impasses. Even through fact-finding recommendations are advisory and both parties have the authority to reject, public pressure could be strong enough to force agreement even if it does not come about on the initiative of the parties.

As with mediation, fact-finding has certain limitations. Since it is a process which results in non-binding recommendations, it is not a final resolution which the parties are compelled to adopt. However, experience indicates that in spite of its obvious limitations, fact-finding is perceived to be helpful in encouraging settlement between the parties.

Mediation and fact-finding are limited to situations where the parties are, for any number of reasons, prone to accept compromise. Another impasse procedure used in some public sector disputes is arbitration in some form. The forms can range from a combination of mediation and arbitration commonly referred to as med-arb to final offer/issue arbitration.

Arbitration has long been used by both the private and public sectors to resolve grievances, where the interpretation of the terms of an agreement is involved. However, the concept of arbitration of "interest" disputes has not received wide acceptance in the public sector and is practically non-existent in the private sector, where the strike is the ultimate weapon used in impasse resolution.

Since strikes by public employees are unlawful in most states, it would seem a more balanced atmosphere for collective bargaining would be achieved by invoking binding or compulsory arbitration in public sector bargaining impasses. However, when one investigates the facts of such an arrangement, it is not difficult to reach the conclusion that compulsory arbitration is not a viable alternative for impasse resolution especially in the public schools.

This procedure has certain fatal limitations when viewed from the perspective of a public employer and to a degree from a public employee.

The first most obvious limitation is the delegation to a non-elected third party of the sovereign power granted to public bodies to legislate the terms and conditions of a contract. In many states, this delegation of decision making authority would be beyond the power of the public body.

From the point of view of management, compulsory arbitration could create a "narcotic effect" that would lead employee organizations to feel that ultimate victory lies in the hands of the arbitrator rather than at the table and thereby relegate the bargaining process to nothing more than posturing positions for the arbitrator. Since in many cases arbitrators tend to "split the difference" between the parties positions, unions can strive for "more, more, more" at the bargaining table and then get the "second bit" before the arbitrator for even more. This concept is directly in conflict with the basic process of collective bargaining.

Compulsory arbitration also fails to recognize the unique representative capacity of local boards of education. This concept eliminates the ability of elected school board members to reflect the specific and complex relationship which encompasses not only teachers and school administrators but the entire community as well. This process substitutes input received by board members concerning the mix of attitudes and positions relative to local school operation and needs for a decision by a third-party who has little feel for the total community environment and has no real opportunity to assess and evaluate his decision in light of the total impact.

I have found slight support for compulsory arbitration from public employee

representatives. The representatives do not trust the arbitrator to deal with the impasse to the exclusion of external community pressure and they would rather rely upon union power in the more traditional modes, such as strikes. In fact, if the arbitration award threatens the union's future organizational power there is no guarantee that the union will not call a strike in defiance of law and the arbitrators award.

In order to overcome arbitrators tendencies to compromise awards a technique called final offer arbitration has been developed. Final offer arbitration also encourages parties to enter into good faith bargaining at the table. Final offer arbitration limits the arbitrator to choosing between the last best offer of one party or the other on an entire package basis. There is a spin-off possible by allowing the arbitration to choose on a last best offer basis issue by issue until the total package is decided. This type of arbitration is final and binding on the parties based upon their proposed last best offers without granting the arbitrator an undue amount of discretion. Thus, there is an element of coercion because a third party will select one of the offers as binding while there is the guarantee of no compromise by the arbitrator.

This process of forced choice fails to recognize the reality that both parties in most disputes have positions that should be considered on their merits and both parties have unreasonable or unworkable positions, however, the arbitrator is forced to choose the least desirable set of total options. In my opinion this is an unacceptable dilemma when applied to school board impasse situations.

While the emphasis of this discussion has been an assessment of alternative bargaining impasse resolution techniques, it must be stressed that unless the basic objective of all parties, including neutrals, is to increase the number of settlements through improved

direct negotiations without any outside assistance, no procedure will suffice.